In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE MISSION ROCK COMPANY. } No. 198.

MEMORANDUM BY THE SOLICITOR-GENERAL IN REPLY.

To my surprise, counsel for the Mission Rock Company, on oral argument, made the unqualified assertion that under the statutes and decisions of California a proprietor of land abutting on tide water has no riparian rights. The only cases I recall he cited were *Coburn* v. *Ames* (52 California, 385), and *Weber* v. *Board of Harbor Commrs.* (18 Wall., 57). As both these cases had been cited in my brief, I did not deem it worth while to make any oral reply. Since then I have re-read these cases and others on the subject of riparian rights under California law, and for the purpose only of aiding the court, I am printing this memorandum. I shall furnish opposing counsel a copy of it.

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I.

As this case stands, there being no appeal by the Mission Rock Company from the judgment of the circuit court of appeals, it is conceded that the United States is entitled to the possession of Mission Rock as it existed before the improvements made by the defendant and its grantors; that is, that Mission Rock was an island, constituting upland, distinct from submerged land, and owned by the United States.

II.

But it is asserted that even if the United States owned this island it had no riparian or littoral right of access to the navigable waters surrounding it.

The case of *Coburn* v. *Ames* (52 Calif., 385) leaves undecided the right of the riparian owner to wharf out to deep water. It assumes that the riparian owner is entitled to wharf out to deep water, the court saying (p. 397):

> For our present purpose, we shall assume that the proceedings were null and void, and conferred no right to construct the wharf or chute, and shall *further assume that the plaintiff, as a riparian owner, is entitled to wharf out to deep water.*

Again (p. 398):

> *Assuming* as we do, for the purposes of this decision, that *the riparian owner is entitled to wharf out to deep water*, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election.

In a later case, *Shirley* v. *Bishop*, 67 Calif., 543 (1885), the riparian rights of an owner of land bordering on the Straits of Carquinez, were explicitly upheld. These straits connect the Bay of San Pablo, really the upper portion of the Bay of San Francisco, with Suisun Bay, really a further extension of the Bay of San Francisco, being what might be termed the extreme northeast portion of the Bay of San Francisco into which the Sacramento River empties. The city of Benicia lies on the navigable waters of the Straits of Carquinez. The action was one to prevent the construction of a wharf, and to cause the removal of the portion thereof already constructed, which interfered with the access of the riparian proprietor to the navigable waters of the Straits of Carquinez.

The court said (p. 545):

> There was no compensation "first made or paid" plaintiffs for the damages to their said property, as should have been done in order to meet the requirements of section 14, article 1, of the constitution of California. (*Reardon* v. *San Francisco*, 66 Cal., 492.) The wharf if built by defendants as contemplated would deprive the plaintiffs of ingress and egress to and from their lots and the navigable waters of the State.
>
> On the eastern side of said lots the navigable waters of the Straits of Carquinez are a public highway. (Pol. Code, sec. 2348.) *The free access to that public water highway was a vested right* and privilege that belonged to the plaintiffs, and of which they could not be deprived in the manner claimed as legal in this contention.

(Pol. Code, sec. 2919; *Schulte* v. *N. P. T. Co.*, 50 Cal., 592; *Blanc* v. *Klumpe*, 29 Cal., 156; *Sackland* v. *N. M. R. R. Co.*, 31 Mo., 181; Gould on Waters, secs. 123, 124, 149, 150, 154, and cases there cited.)

If the wharf of the defendants could be built and was allowed to stand, it would preclude the plaintiffs from building any wharf as to 60 feet of their water front, declared such by law, and would prevent ingress and egress of vessels from a wharf previously built by them on another portion of their water front, of said block of land, and this effect upon their land in the absence of all compensation would, if not prevented, result in injury grievous and irreparable, from which as threatened they should have relief.

It clearly appears by the findings that the defendants were creating a *nuisance* in the navigable waters of the State. (Civ. Code, sec. 3479; *Blanc* v. *Klumpe*, 29 Cal., 156.)

Under the circumstances of this case, it is not legal or equitable to construct and maintain the wharf as contended for by the defendants; it would be in disregard of private rights and result in great and irreparable damage to private property, without compensation, for an *ostensible public use.*

Judging from the map, Carquinez Straits must be between 1 and 2 miles wide—probably three times as wide as the body of navigable water lying between Mission Island and the city of San Francisco.

Section 14, article 1, of the constitution of California

referred to by the court provides (Deering's Annotated Code, p. 35):

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

Section 2348, Political Code, also referred to above, provides (Deering's Annotated Code, p. 357):

> Navigable waters, and all streams of sufficient capacity to transport the products of the country, are public ways for the purposes of navigation and of such transportation.

Section 2919 of the Political Code reads:

> No authority must be granted under this chapter to interfere with vested rights, nor to interfere with or infringe grants heretofore made by State authority; nor does authority to construct a wharf, chute, or pier continue for a longer period than two years, unless the same is within that time completed.

Gould on Waters (3d edition) says respecting riparian rights in California, section 174:

> In California the owner of land bordering upon the seashore holds presumably only to

> ordinary high-water mark, and the shore itself is presumed to remain the property of the State, *while the right to wharf out appears to be conceded.*

Citing many California cases, to which I ask the court's attention.

In 1 Dillon's Municipal Corporations (4th ed.), page 169, the right of the riparian owner, under the common law, to wharf out, is thus stated:

> SEC. 106. By the common law, the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian proprietors on ocean, lake, or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the State for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. *The right terminates at the point of navigability*, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such structures are presumably lawful where they are confined to the shore, and no positive law is violated in their erection.

The dissenting opinion in *Scranton* v. *Wheeler* (179 U. S., 141, 165), contains an elaborate review of the cases, both State and Federal, on the subject of the riparian right of access to navigable waters.

In my argument I insisted that this court in *Weber* v. *Harbor Comm'rs* (18 Wall., 57) had explicitly affirmed the doctrine laid down in *Yates* v. *Milwaukee* (10 Wall., 497, 504), and this further appears by the language of the court in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.* (109 U. S., 673, 682):

> A riparian proprietor, in the language of Mr. Justice Miller in *Yates* v. *Milwaukee* (10 Wall., 497–504), is one "whose land is bounded by a navigable stream;" and among the rights he is entitled to as such are "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. (*Weber* v. *Harbor Commissioners*, 18 Wall., 57.)

In *Polhemus* v. *Bateman* (60 N. J. Law, 163), it was held that a deed from the riparian commissioners of New Jersey of some seventy acres of land under navigable water, which recited that if the grantee was not the owner of the *ripa*, the deed should be void, might, in an action brought by the grantee against a citizen who was engaged in fishing upon the granted land, be assailed by evidence showing that the grantee was not the owner of the *ripa*.

In *Marcus Sayre Co.* v. *Newark*, 60 N. J. Eq., 360 (1900), in the concurring opinion of Depue, J., this language is used (p. 372):

> But by the common law of England and the local common law of this State, the owner of

riparian lands acquires a property in his reclamations by wharfing out or otherwise improving, and the State can not appropriate the shore so recovered to public use without adequate compensation. Consequently, for any invasion of his property or use of it without lawful authority such owner is entitled to the same remedies as the owner of property is entitled to under the general law of the State. Among the rights of the riparian owner who has made his improvements between high and low water mark is the right to the use of his wharf and of access to the navigable waters. (Citing *Lyon* v. *The Fishmongers Co.*, L. R. 1 App. Cas., 662, 671.)

III.

In *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525 (1885, Field, J.), while the court held that the property and franchises of a railroad within the Fort Leavenworth Military Reservation were taxable by the State of Kansas owing to the fact that, in the act admitting Kansas as a State, there was no reservation of Federal jurisdiction over the reservation, and in the subsequent act of Kansas ceding to the United States jurisdiction there was a proviso "saving further to said State the right to tax railroad, bridge, or other corporations, their franchises and property on said reservation," nevertheless the court asserts that any exercise by a State of jurisdiction over Federal property inconsistent with the Federal use to which such property has been devoted can not, under the Constitution, be permitted to exist. Thus the court says (p. 539):

> Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government.

Again, bottom page 541:

> It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the General Government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes.

All this applies to an island belonging to the United States and of such character and location that the President has deemed it advisable to reserve it permanently for naval purposes.

IV.

In the oral argument, opposing counsel described the marine railway which was constructed at Mission

Rock to comply with the condition of the California grant. There is nothing in the record upon this point, and I have not been able, up to this time, to ascertain the precise use made of Mission Rock in connection with this railway. The effect and apparent purpose of counsel's statement was to lead the court to believe that the island was of no use in connection with the operation of the marine railway. But I can not understand how a ship could be pulled up on the marine railway except by a power operated from or attached to the island. Certainly the ships did not sail or steam up on the marine railway. If warped up, there must have been an attachment on the island. Possibly the height of the rock served a good purpose in this connection. Moreover, according to counsel, the marine railway was used as a means of exposing the hull and bottom of the ship, so that repairs might be made. There must have been a place for keeping the machinery, tools, and materials needed to make such repairs, and no doubt the island was useful for this purpose. Ships loaded with ballast putting in for repairs would doubtless dump their ballast before being hauled up on the marine railway, and it is a fair inference that deposits thus made at the island suggested and led to the use ultimately made of it.

JOHN K. RICHARDS,

Solicitor-General.

MARCH 14, 1903.

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